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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 303

YEE HEM, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

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[fols. 1-3] CAPTION—Omitted

[fol. 4] IN THE

UNITED STATES DISTRICT COURT

INDICTMENT—Filed Nov. 20, 1923

The Grand Jurors of the United States of America, duly impanelled, sworn and charged to inquire of crimes and offenses within and for the body of the Eastern Division of the Northern District of Ohio, upon their oath present and find that Yee Hem, late of the Division and District aforesaid, heretofore, to wit, on or about the 21st day of August, A. D. 1923, at Cleveland, in the County of Cuyahoga, State of Ohio, in the Division and District aforesaid, and within the jurisdiction of this Court, did feloniously conceal and facilitate the concealment, after importation into the United States, contrary to law, of a certain narcotic drug, to wit, a certain quantity of smoking opium contained in a tin toy and a certain quantity of smoking opium contained in a package of cigarettes, he then and there well knowing the said narcotic drugs to have been theretofore imported into the United States, contrary to law; contrary to the form of the Statute of the United States in such case made and provided, and against the peace and dignity of the United States.

Fred S. Day, Asst. United States Attorney.

[File endorsement omitted.]

[fol. 5] IN UNITED STATES DISTRICT COURT

UNITED STATES

vs.

YEE HEM

Criminal

PLEA NOT GUILTY—Filed Nov. 27, 1923

This day came the United States Attorney on behalf of the United States and also came the defendant at the bar of court, and being arraigned and waiving the reading of the indictment, for plea says that he is not guilty in manner and form as he is by the indictment therein and thereby charged. It is further ordered that defendant enter into a recognizance in the sum of Five Thousand ($5,000.00) Dollars for his appearance here in this court from day to day during the present term and from term to term thereafter to answer the

indictment pending against him, and in default he be remanded into the custody of the United States Marshal.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONTINUING CASE—Filed Dec. 12, 1923

This day came the parties by their attorneys and also came the following named jurors, to wit: Amos Keller, August J. Loew, O. J. Miller, Wm. Miller, C. D. Powell, Norman Ripple, Frank Swallem, Henry Shupp, Jos. Sullivan, L. A. Town, D. E. Wilson and G. D. Wheeler, who were duly impaneled and sworn herein according to law and the trial proceeded. And the said jury having heard a part of the testimony adduced on behalf of the Government and the hour of adjournment having arrived, the further hearing of said case is continued until tomorrow morning at 9:30 o'clock.

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

VERDICT AND JUDGMENT—Filed Dec. 13, 1923

This day again came the parties by their attorneys and also came the jurors heretofore impaneled and sworn herein according to law, and the trial proceeded. And the said jury having heard all the testimony adduced on behalf of the parties, the arguments of counsel and the charge of the Court, retired to their room in custody of a sworn officer of this court to deliberate upon their verdict. And now comes said jury into open court with their verdict in writing, signed by their foreman, which verdict reads and is in the words and figures following, to wit:

"UNITED STATES OF AMERICA,
Northern District of Ohio,
Eastern Division, ss:

IN DISTRICT COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1923

No. 7795

THE UNITED STATES, Plaintiff,
vs.
YEE HEM, Defendant

Verdict

We, the jury in this case, being duly impaneled and sworn, do find the defendant Yee Hem is guilty.

Amos Keller, Foreman."

which said verdict was by the Clerk of this court read in the hearing of said jury, when to which they gave their assent.

Thereupon the defendant moved the Court to arrest judgment and was submitted to the Court and argued by counsel, on consideration thereof the Court overruled said motion, to which ruling of the Court defendant, by his attorney, excepts.

And the Court coming to sentence, and having inquired of said defendant whether he had anything to say before sentence was pronounced and receiving his reply, it is ordered that defendant be confined in the Dayton Workhouse at Dayton, Ohio, for a period of eight months and also that he pay a fine to the United States of [fol. 8] Five Hundred ($500.00) Dollars, for which sum judgment is rendered and execution issue for the collection. And the Court being advised that defendant has already been confined in the Cuyahoga County Jail for a period of one hundred and thirten (113) days, it is ordered that he be given credit for same and his total confinement in the Dayton Workhouse at Dayton, Ohio, be one hundred and thirty (130) days. It is further ordered that defendant enter into a recognizance in the sum of Two Thousand ($2,000.00) Dollars pending error proceedings, to act as a supersedeas for the payment of all damages, fines, costs and for appearance.

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION IN ARREST OF JUDGMENT—Filed Dec. 13, 1923

Now comes the defendant herein and moves the Court to arrest judgment in the above entitled action because the statute under which

the indictment in this case was brought and trial had, to wit: An Act to amend the Act entitled "An Act to prohibit the importation of opium for other than medicinal purposes, approved February 9, 1909, as amended," is unconstitutional and void in this—that by virtue of paragraph "F" of Section 2 it provides as follows:

"Whenever on trial for a violation of Subdivision "C" the defendant is shown to have, or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

The defendant was denied in the trial of this case due process of law and a trial by jury as provided and guaranteed by the 5th and 7th and 14th Amendments to the Constitution of the United States, for the reason that the Act aforesaid invaded the proper province of the jury and abridges and impairs the rightful function of the jury as the sole judges of the facts and the weight of the evidence and the credibility of the witnesses: And, because:

2nd. Paragraph "F" of Section 2 of the Statute under which the indictment in this case was brought and trial had, to wit: an Act to amend the Act entitled "An act to prohibit the importation of opium for other than medicinal purposes, approved February 9, 1909, as amended", is unconstitutional and void in this—that the defendant was denied in the trial of this case due process of law and [fol. 10] a trial by jury as provided and guaranteed by the 5th and 7th Amendments to the Constitution of the United States, for the reason that the Act aforesaid invaded the proper province of the jury and abridges and impairs the rightful function of the jury as the sole judges of the facts and the weight of the evidence and the credibility of the witnesses, and because the said paragraph "F" in effect obliged the defendant to testify against himself.

Joseph C. Breitenstein, Girard J. Pilliod, Attorneys for Defendant.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR A NEW TRIAL AND ORDER OVERRULING SAME—Filed Dec. 18, 1923

Now comes the defendant, Yee Hem, and moves the Court to set aside the verdict of the jury and grant a new trial therein for that:

1. Said verdict is against the weight of the evidence.

2. Said verdict is contrary to law.

3. The Court erred in his charge to the jury, in the particulars to which the defendant at the time excepted.

4. The Court erred in refusing to instruct the jury as requested by the defendant.

5. The Court erred in the admission of testimony offered by the Government against the objection of the defendant, in the particulars to which the defendant at the time excepted.

Joseph C. Breitenstein, G. J. Pilliod, Attorneys for Defendant.

Overruled December 12th, 1923. Jones, United States District Judge, Northern District of Ohio, Eastern Division.

[fol. 12] [Title omitted]

This day this cause came on to be heard on the motion of defendant for a new trial and was submitted to the Court, on consideration thereof the Court overruled said motion, to which ruling of the Court defendant, by his attorneys, excepts.

It is further ordered by the Court that the defendant have fifty (50) days in which to prepare, settle and file his bill of exceptions in accord with General Rule No. 38.

[fol. 13] In United States District Court

[Title omitted]

Petition for Writ of Error—Filed Dec. 29, 1923

To the Honorable Paul Jones, one of the judges of said court:

Now comes the plaintiff in error, who was the defendant in this Court, Yee Hem, and says that on the 12th day of December, 1923, this Court entered judgment in favor of defendant in error and against this plaintiff in error, in which judgment and the proceedings had prior thereto in said case certain errors were committed, to the prejudice of this plaintiff in error, all of which in more detail will appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff in error prays that a writ of error in his behalf may be issued to the United States Supreme Court for the correction of the errors so complained of, which errors so complained of fall within the provisions of Section 238 of the Act entitled "An act to codify, revise and amend the laws lelating to judiciary," approved March 3, 1911, Chapter 231, and that a transcript of the proceedings and papers in this case, duly authenticated, may be sent to the United States Supreme Court.

Joseph C. Breitenstein, G. J. Pilliod, Attorneys for Plaintiff in Error.

[fol. 14] [Title omitted]

I hereby acknowledge service of the within petition for a writ of error and a copy of the assignment of errors above mentioned this 29 day of Dec., 1923, and hereby enter the appearance of the United States of America herein in this proceeding.

Fred Grabien, United States District Attorney.

[fol. 15] In United States District Court

[Title omitted]

Assignment of Errors—Filed Dec. 29, 1923

Now comes the plaintiff in error above named, Yee Hem, and files with his petition for a writ of error herein the following assignment of errors in the above entitled case, on which he will rely in his proceedings on a writ of error, if one be allowed herein. The said Yee Hem, who will be plaintiff in error in said proceedings in error in the United States Supreme Court, says that in the record and proceedings in the above entitled matter there is error manifest on the face of the record in the following respects:

1. In overruling the motion of the plaintiff in error at the close of the Government's case, which appears in the record:

2 The Court erred in his charge to the jury and especially in the following particulars:

"It is further provided by the Act, as amended, that after July 1st, 1913, all smoking opium, or opium prepared for smoking, found within the United States shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the accused to rebut such presumption; that is, where the evidence shows that there is smoking opium in the possession of the accused, at the place and time set forth in the indictment under which he stands charged for the violation of this Act, it will be presumed that such smoking opium was imported after the first day of April, 1909, and the burden of proof is upon the defendant, or the accused, to rebut that presumption. By rebutting the presumption, I mean simply negativing the presumption—introducing evidence which negatives the presumption that he smoking opium was introduced into the country in violation of this law—not by evidence beyond the existence of a reasonable doubt, but evidence which by the probabilities negatives that presumption.

It is also further provided by the Act, as amended, that where one is upon trial for the violation of this section of this law which [fol. 16] I have read to you, and the defendant is shown, by the evidence, to have had possession of such opium or preparation, or derivation thereof, that such possession by the defendant shall be

deemed sufficient evidence to authorize the conviction of the accused, unless the defendant, or the accused, shall explain such possession of the smoking opium to the satisfaction of the jury; that is, it is incumbent upon the defendant, or the accused, where the evidence shows, beyond a reasonable doubt, that the smoking opium was in his possession at the time and place set forth in the indictment, it is the duty of the defendant, or accused, to explain to the jury that he is rightfully in possession of the smoking opium—at least, explain it to the satisfaction of the jury and to the reasonable minds which under the law are to constitute the jury passing upon that question".

to all of which plaintiff in error duly excepted, as appears from the record as follows:

"Now, your Honor, the defendant objects to the charge of the Court in which the Court said, in quoting the Act of February 9th, 1909, as amended, that whenever one is on trial for violation of subdivision C, the defendant is shown to have had or to have been in possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction, unless the defendant explains the possession to the satisfaction of the jury. We object, because such charge is a direction from the Court to the jury to find the defendant guilty, that it violates the defendant's rights as guaranteed under the fifth and seventh amendments to the Constitution of the United States, and that it deprives him of his liberty without due process of law; and that the charge of the Court invades the provi-ce of the jury as sole judges of the evidence and of the weight of the evidence and credibility of the witnesses, and that the accused is in effect then obliged to testify against himself.

The Court: You may have those exceptions to the charge in that respect.

Have you anything further, Mr. Day?

Mr. Day: We have no requests.

Mr. Breitenstein: Your Honor, I also desire to suggest and except at this time to that particular portion of the charge where you said, in substance, in connection with that Act of February 9th, 1909, that where opium is found in the possession of the accused, that the [fol. 17] burden of proof is upon the defendant. I except, because that also interferes with the defendant's right of due process of law and is in violation of his rights as guaranteed under the fifth, seventh and fourteenth amendments to the Constitution of the United States.

The Court: Well, you may have your exception.

Mr. Breitenstein: Please note an exception.

The Court: Now, members of the jury, you will have with you in your jury room such exhibits as have been marked for identification, offered and received in evidence, and as well a copy of this indictment against the accused. It is merely, however, for your information and not to be taken by you in any sense as evidence against the defendant, or as any presumption as to his guilt, but

merely for your information as to what the charge of the Government is against this defendant.

Mr. Breitenstein: Your Honor, may I also except to that part of your charge wherein you refer to the particular section of the law relating to the burden of proof and the sufficiency of the evidence, in that it calls the attention of the jury to the fact that the defendant did not take the witness stand on his own behalf, in violation of Article V of the Constitution of the United States.

The Court: You may retire."

3. The Court erred in overruling the motion of plaintiff in error to arrest judgment, which appears of record herein:

4. The Court erred in overruling motion of plaintiff in error for a new trial and to each ground thereof, to which the plaintiff in error duly excepted.

The plaintiff in error says that each of the foregoing errors was prejudicial to his substantial rights and he, therefore, prays that the judgment of said District Court of the United States, for the Northern District of Ohio, Eastern Division, be reversed, and that plaintiff in error be restored to all things that he has lost by reason thereof.

Joseph C. Breitenstein, G. J. Pilliod, Attorneys for Plaintiff in Error.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed Dec. 29, 1923

This 29 day of December, 1923, came the plaintiff in error, Yee Hem, by his attorneys duly authorized, and filed herein and presented to the Court his petition praying for the allowance of a writ of error and his assignment of errors intended to be urged by him, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Supreme Court, and that such other and various proceedings may be had as may be proper in the premises.

On consideration thereof the Court hereby allows the writ of error prayed for, and it is further ordered that upon the plaintiff in error giving bond, with surety satisfactory to the Court, in the penal sum of Two Thousand Dollars ($2,000.00), conditioned that he shall appear in this court from day to day during the present term and from term to term of this court hereafter, pending said proposed proceedings upon said writ of error in said United States Supreme Court, pay the fine and costs assessed against him and surrender himself to the United States Marshal, and that he shall then and there be present to abide the judgment of this court, or

that of said the United States Supreme Court, and not depart the court without leave thereof, then this writ of error shall act as a supersedeas, and provided that citation shall have issued herein and been served, as provided in paragraph 2, section 36 of the Rules of the United States Supreme Court.

[fols. 19 & 20] SUPERSEDEAS BOND ON WRIT OF ERROR FOR $2,000 —Approved and filed Dec. 29, 1923; omitted in printing

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[fol. 21] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR AND RETURN—Filed Feb. 23, 1924

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the Northern District of Ohio, Eastern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between the United States of America as plaintiff, and Yee Hem as defendant, a manifest error hath happened, to the great damage of the said Yee Hem, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 29 day of December, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the United States of America the one hundred and forty-eighth.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio, by M. E. Bauman, Deputy Clerk. (Seal of the District Court, Northern District of Ohio.)

Allowed by Paul Jones, U. S. D. J.

[fol. 22] [File endorsement omitted.]

[Title omitted]

In obedience to the within writ, I herewith transmit to the United States Supreme Court, a true and complete transcript of the record and proceedings in the foregoing entitled cause this 23 day of February, A. D. 1924.

B. C. Miller, Clerk of the District Court of the United States for the Northern District of Ohio. M. E. Bauman, Deputy. (Seal of the District Court, Northern District of Ohio.)

[fol. 23] CITATION—In usual form, showing service on James M. Beck; omitted in printing

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[fol. 24] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS—Filed Jan. 23, 1924

[Title omitted]

This day the bill of exceptions in this case was presented to the Court, the same having been delivered to the Clerk by the excepting party in accordance with Rule 38 of the General Rules of this court, and the adverse counsel having been notified of such delivery and no objections or suggestions thereto having been filed, the same is allowed and signed and ordered to be filed in this case.

[fol. 25] IN UNITED STATES DISTRICT

[Title omitted]

Bill of Exceptions—Filed Jan. 23, 1924

Trial commenced December 12, 1923.

Thereupon statements of the case were made to the jury by counsel for the respective parties.

Thereupon the plaintiff, defendant in error herein, called JOSEPH J. MURPHY, who, being first duly sworn, testified as follows:

"My name is Joseph J. Murphy. I reside in Cleveland, Ohio, and am now, and was during August, 1923, in the employ of the United States Government, Treasury Department, as a Narcotic Inspector attached to the Cleveland office. It is my duty to investigate alleged or suspected violations of the narcotic laws of the United States and to make such arrests as my duty may require. On the

21st day of August, 1923, at about eleven o'clock P. M., in company with Otto Diskowski, a member of the Cleveland Police Force, I [fol. 26] went to the premises known as 1283 Ontario Street, in the City of Cleveland, Ohio. This is a lodging house for Chinese. I had a search warrant issued by the United States Commissioner at Cleveland. In room 10 on the second floor of these premises I and my companion discovered Yee Hem, the plaintiff in error in this case, asleep upon a wooden bench. In his hand was an opium pipe. On the bench beside him was a package of cigarettes; in each of these cigarettes was a small black pellet of suspected smoking opium. We placed Yee Hem under arrest and conducted him to the Police Station. The opium pipe and the package of cigarettes now handed to me are the same which we found in the possession of Yee Hem, the plaintiff in error in this case, at the time and place aforesaid."

Otto Diskowski, a witness called by the plaintiff, defendant in error herein, being first duly sworn, testified as follows:

"I am a member of the Police Force of Cleveland, Ohio, assigned to assist the Federal Narcotic Officers, and was so assigned during August, 1923. On August 21, 1923, at about eleven o'clock p. m., I accompanied Joseph J. Murphy, Federal Narcotic Agent, to certain premises which are No. 1283 Ontario Street, in the City of Cleveland, Ohio. This building is occupied exclusively by Chinese lodgers. Mr. Joseph Murphy had a search warrant which had been issued by the United States Commissioner at Cleveland. We proceeded to room 10 on the second floor in these premises and there we found Yee Hem, the plaintiff in error in this case, lying asleep upon a wooden bench. He had an opium pipe in his hand. We also discovered by his side upon a bench a package of cigarettes; in each of these cigarettes was a small black pellet of suspected smoking opium. We arrested Yee Hem and locked him up in the Police Station pending his delivery to the United States Marshal. The opium pipe and the package of cigarettes now handed to me are the same which we found in the possession of Yee Hem, the plaintiff in error in this case, at the time and place aforesaid."

[fol. 27] E. J. Nealon, being a witness called by the defendant in error, being first duly sworn, testified as follows:

"My name is E. J. Nealon. I reside at Columbus, Ohio, and am a chemist by profession. I am in the service of the United States Government, Treasury Department, in charge of the Industrial Alcohol and Chemical Division at Columbus, Ohio. It is one of my duties to chemically analyze suspected narcotics found by Federal Narcotic Officers. I have examined and analyzed chemically the contents of the bowl of the opium pipe now handed to me as de-

fendant in error's "Exhibit 1" and found the same to contain Yen Shee, a residue of smoking opium. I have examined the package of cigarettes now handed to me as defendant in error's "Exhibit 2" and found that the cigarettes contained small black pellets. I have examined these chemically and found that they are smoking opium."

Plaintiff, defendant in error herein, rested.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Thereupon the defendant, plaintiff in error herein, moved the Court to arrest the testimony from the jury and direct the jury to return a verdict of not guilty on the ground of the insufficiency of the evidence to establish the allegations of the indictment, which motion was overruled by the Court, to which ruling of the Court, the defendant in the court below, the plaintiff in error herein, then and there duly excepted.

Thereupon the defendant, plaintiff in error herein, rested.

Thereupon counsel for the respective parties argued the case to the jury; and thereupon the Court charged the jury as follows:

COURT'S INSTRUCTIONS TO JURY

JONES, J:

Members of the jury, it now becomes the duty of the Court to instruct you with respect to the rules of law which he deems applicable to the facts in this case, and which you will apply to your findings of fact from the evidence.

The defendant, Yee Hem, in this case stands charged with the [fol. 28] violation of a law of the United States known as the Act of February 9th, 1909, as amended by the Act of January 17th, 1914, and as amended by the Act of May 26th, 1922. It is provided that a violation of that Act shall consist in fraudulently or knowingly importing or bringing into the United States, or assisting in so doing, any opium, or any preparation or derivative thereof, contrary to law, or receiving, concealing or selling, or in any manner facilitating the transportation, concealment or sale of such opium, preparation or derivative thereof, after importation, knowing the same to have been imported contrary to law.

It is further provided by the Act, as amended, that after July 1st, 1913, all smoking opium, or opium prepared for smoking, found within the United States, shall be presumed to have been imported after the first day of April, 1919, and the burden of proof shall be on the accused to rebut such presumption; that is, where the evidence shows that there is smoking opium in the possession of the accused at the place and time set forth in the indictment under which he stands charged for the violation of this Act, it will be presumed that such smoking opium was imported after the first day of April, 1909, and the burden of proof is upon the defendant,

or the accused, to rebut that presumption. By rebutting the presumption, I mean simply negativing the presumption—introducing evidence which negatives the presumption that the smoking opium was introduced into the country in violation of this law—not by evidence beyond the existence of a reasonable doubt, but evidence which by the probabilities negatives that presumption.

It is also further provided by the Act, as amended, that where one is upon trial for the violation of this section of this law which I have read to you, and the defendant is shown by the evidence to have had possession of such opium, or preparation or derivative thereof, that such possession by the defendant shall be deemed sufficient evidence to authorize the conviction of the accused, unless the defendant, or the accused, shall explain such possession of the smoking opium to the satisfaction of the jury; that is, it is incumbent upon [fol. 29] the defendant, or the accused, where the evidence shows, beyond a reasonable doubt, that the smoking opium was in his possession at the time and place set forth in the indictment, it is the duty of the defendant, or accused, to explain to the jury that he is rightfully in possession of the smoking opium—at least explain it to the satisfaction of the jury and to the reasonable minds which under the law are to constitute the jury passing upon that question.

Now the indictment in this case charges that this defendant, Yee Hem, did, in the Eastern Division of the Northern District of Ohio, and in Cuyahoga County, on or about the 21st day of August, A. D. 1923, and within the jurisdiction of this Court, feloniously conceal and facilitate the concealment, after importation into the United States, contrary to law, a certain narcotic drug, to wit, a certain quantity of smoking opium contained in a tin toy and a certain quantity of smoking opium contained in a package of cigarettes, knowing then and there that said narcotic drugs, said opium, to have been theretofore imported into the United States, contrary to law, as I have just heretofore given it to you.

Now it is that violation of the law, which I outlined to you, with which this defendant stands charged. This indictment was returned by a grand jury of the United States, duly impaneled and sworn, in the Eastern Division of the Northern District of Ohio. To this indictment the defendant, Yee Hem, has entered a plea of not guilty. That plea puts in issue for the jurors to determine from the evidence every essential and material element which it takes to constitute the offense with which the defendant, or the accused, stands charged.

The elements of the offense in the light of the law applicable to the situation, as the Court views it, would be: that this defendant had in his possession smoking opium, contrary to the provisions of the law which I have outlined to you, and contrary to the provisions of the specific law and the specific statement of the law as made in the indictment returned by the grand jury. The fact that this indictment was returned by the grand jury, or that the Court in- [fol. 30] structs you with respect to that fact, creates no presumption as to the guilt of this defendant. The law presumes that the defend-

ant is innocent of the offense charged and that presumption of innocence goes with him throughout the trial of the case and until the Government has satisfied the minds of the jurors, beyond a reasonable doubt, that the defendant is guilty of the offense charged in this indictment and the violation of the law as claimed by the Government in that indictment. The burden to adduce proof, that is, proof beyond the existence of a reasonable doubt as to the defendant's guilty, is upon the Government at all times and throughout the trial.

It may be that I have instructed you in civil jury cases, in which you have sat as jurors in this court, that probabilities are sufficient in considering the force and effect of evidence necessary to a determination of a case, or a favorable verdict for the persons upon whom the burden rests; however, in a case such as this one, (what we call a criminal case) we measure evidence not by probabilities, but by reasonable certainties—by evidence beyond a reasonable doubt. In order that you may have a clear conception of the meaning and effect of the words "reasonable doubt," I say to you that a verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. You will be justified and are required to consider a reasonable doubt as existing, if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained upon many subjects, but when a full and candid consideration of all of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail; that is, it is not required that you be satisfied beyond the possibility of a doubt, but you must feel an abiding conviction of the defendant's guilt and have no honest uncertainty about it.

[fol. 31] The questions of fact, then, for your determination and consideration, under the rules of law with respect to the burden of proof and the extent and degree of proof, in view of the fact that only the Government has introduced evidence, are: a consideration of the question as to whether or not this defendant did have smoking opium in his possession at the time and place claimed by the Government in this indictment against the defendant; that he had this smoking opium contrary to law, as I have outlined it to you, and against the provisions of that law, taking into consideration, however, those sections of the law which I gave to you in the beginning as a test or measure of the responsibility of the defendant in the matter of explaining the possession of the smoking opium, if such you find he had in his possession, as charged in this indictment; also taking into consideration, as well, the provisions of the law which provide that the burden is upon the accused to negative the presumption that the smoking opium, if found in his possession, was imported into the country subsequent to the limitations which I have given you as to the law on that subject—that is, imported after the first day of April, 1909.

Now if you find from the evidence, beyond a reasonable doubt, that this defendant, Yee Hem, did, in the Northern District of Ohio, in the Eastern Division, and in Cuyahoga County, on or about the 21st day of August, 1923, and within the jurisdiction of this Court, feloniously conceal and facilitate the concealment, after the importation into the United States, contrary to law, of a certain narcotic drug, to wit, this smoking opium contained in a tin toy and a certain quantity of smoking opium contained in a package of cigarettes, then the defendant would be guilty of the offense charged in this indictment. Upon the other hand, if the Government has failed to introduce proof upon all of the essential and material averments of the indictment necessary to constitute the crime, under the law with which the defendant stands charged, beyond a reasonable doubt, then your duty would be to acquit the defendant of this offense and return a verdict of not guilty.

Now, you are the judges of the facts and the evidence which [fol. 32] has been presented here in open court. I do not believe in this case it is necessary that the Court give to you any impression of the facts that he may have obtained, and, as I shall not invade that province of yours, I shall expect you to be guided solely by the law which the Court has given to you and not undertake to set up what you think the law is or what you think it ought to be in this case. You are not responsible for any punishment which may come to the accused, if convicted, and you cannot consider that in your deliberations. Human punishment is not inflicted in a spirit of revenge. Its object is not to inflict pain or suffering as an act of retaliation merely, but the guilty are punished that the innocent may be protected. It is the example to those who may contemplate crime that they will suffer the same punishment.

You are not to be swayed by bias, prejudice nor passion in the determination of the evidence in this case and in a finding as to the guilt or innocence of this defendant. The fact that he is a Chinese and not a citizen of this country must have no place in your consideration of the evidence, or be the basis of any verdict which you may return in this case.

After a full and fair consideration of all of the evidence in this case, it will be necessary that all twelve of the members of the jury concur in a verdict. It is not required that all of the jurors sign the verdict, but it is only required that the verdict upon which all twelve concur be executed by the foreman, whom you will choose upon your retirement.

COLLOQUY OF COURT AND COUNSEL

Now, gentlemen, are there any matters that you desire to call to my attention at this time and which may have been omitted.

Mr. Pilliod: If the Court please, I had submitted several suggested charges. Some of those have been already included in the Court's remarks. I think the Court has those. Might not this be included: The Court is respectfully requested to charge that crude opium may

be lawfully and, subject to certain requirements of law and Governmental and departmental regulations, imported or brought into the [fol. 33] United States, and could so lawfully be imported or brought into the United States at the time and prior to the time when this offense was alleged to have been committed.

The Court: Well, upon that, there is no evidence other than the evidence adduced on behalf of the Government.

Mr. Pilliod: Well, doesn't the law speak for itself?

The Court: If it has any application to the facts and the evidence, yes.

Mr. Pilliod: But isn't the jury entitled to know, in the absence of any specific proof that this particular narcotic had been smuggled unlawfully into the country, that it might be a part of the opium lawfully imported into the country and opium converted into smoking opium. That is a possibility which the jury has a right to consider.

The Court: What do you say, Mr. Day?

Mr. Day: I believe, your Honor, that has no application to this particular charge. The law specifically states that smoking opium found in the possession of a violator, of an alleged violator, is presumed to have been imported before February 9th, 1909, and does not go into the fact as to whether it is imported and converted.

The Court: I think I will stand on that. You may have the benefit of an exception to the Court's refusal to give that.

Mr. Pilliod: Note an exception. And I would suggest that the Court charge that smoking opium is manufactured from crude opium; that while smoking opium cannot, of course, be lawfully imported into the United States, that crude opium might be. It would make it more explicit. It is not lawfully possible to import any smoking opium into the United States. I think I am right about that.

The Court: Well, that would be true if there were some dispute on the question, and then I would feel that you would be entitled to the charge, but there isn't any controversy on the question and I am submitting the question upon which evidence has been introduced to the jury; that is, I am not in fact deciding that point, but requiring [fol. 34] the Government to prove that. You may have an exception.

Mr. Pilliod: Now, your Honor, the defendant objects to the charge of the Court in which the Court said, in quoting the Act of February 9th, 1909, as amended, that whenever one is on trial for violation of sub-division C, the defendant is shown to have had or to have been in possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction, unless the defendant explains the possession to the satisfaction of the jury. We object, because such charge is a direction from the Court to the jury to find the defendant guilty, that it violates the defendant's rights as guaranteed under the fifth and seventh amendments to the Constitution of the United States, in that it deprives him of his liberty without due process of law; and that the charge of the Court invades the province of the jury as sole judges of the evidence and of the weight of the evidence and credibility of the witnesses, and that the accused is in effect then obliged to testify against himself.

The Court: You may have those exceptions to the charge in that respect.

Have you anything further, Mr. Day?

Mr. Day: We have no requests.

Mr. Breitenstein: Your Honor, I also desire to suggest and except at this time to that particular portion of the charge where you said, in substance, in connection with that Act of February 9th, 1909, that where opium is found in the possession of the accused, that the burden of proof is upon the defendant. I except, because that also interferes with the defendant's right of due process of law and is in violation of his rights as guaranteed under the fifth, seventh and fourteenth amendments to the Constitution of the United States.

The Court: Well, you may have your exception.

Mr. Breitenstein: Please note an exception.

The Court: Now, members of the jury, you will have with you in your jury room such exhibits as have been marked for identification, offered and received in evidence, and as well a copy of this indictment against the accused. It is merely, however, for your [fol. 35] information and not to be taken by you in any sense as evidence against the defendant, or as any presumption as to his guilt, but merely for your information as to what the charge of the Government is against this defendant.

Mr. Breitenstein: Your Honor, may I also except to that part of your charge wherein you refer to the particular section of the law relating to the burden of proof and the sufficiency of the evidence, in that it calls the attention of the jury to the fact that the defendant did not take the witness stand on his own behalf, in violation of Article V of the Constitution of the United States.

The Court: You may now retire.

Thereupon the jury retired and thereafter returned into the court with its verdict, which said verdict was against the defendant, plaintiff in error herein, as appears of record herein.

Thereafter, and within three days after the rendition of said verdict, the defendant, plaintiff in error herein, filed his written motion to arrest judgment and for a new trial, as appears of record herein, and on consideration thereof, the Court overruled the same and entered judgment against the defendant, plaintiff in error herein as appears of record herein, to each of which actions of the Court defendant, plaintiff in error herein, duly excepted.

And now comes the plaintiff in error and presents to the Court this his bill of exceptions in narrative form taken on the trial of said case, which he prays the Court may be allowed, signed and ordered to be made part of the record in this case.

Upon examination of the foregoing bill of exceptions, the Court finds the same contains all the evidence offered and received on the trial of the above entitled case, and is correct and complete in all respects, and it is hereby approved and allowed and ordered to be filed by the Clerk as part of the record herein, this 22nd day of January, A. D. 1924.

Paul Jones, Judge.

Approved, Fred S. Day, Asst. United States District Atty.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME—Filed Jan. 28, 1924

On application of defendant and for good cause shown, it is ordered that the time for filing the transcript of record in the Supreme Court of the United States be extended to February 28, 1924.

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE CERTIFICATION OF RECORD—Filed Feb. —, 1924

In accordance with Section 7 of Rule 44 of the general rules of this Court, it is hereby agreed that the record as presented to the Clerk by the printer, may be certified by the Clerk as required by law and the rules of the appellate court, as a true, full and complete copy of the original pleadings, papers and orders used on the trial of this cause, as set forth in the precipe for transcript, without further comparison by the Clerk.

Fred S. Day, Attorney for Plaintiff. Joseph C. Breitenstein and Gerard J. Pilliod, Attorneys for Defendant, 1136 Guardian Bldg., Cleveland, Ohio.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRECIPE FOR TRANSCRIPT OF RECORD—Filed Dec. 29, 1923

To the Clerk:

Please prepare transcript of record for the Supreme Court of the United States in the above entitled cause and include therein the following papers and orders:

1. Caption.
2. Indictment.
3. Journal Entry on plea of not guilty.
4. Journal entries on the trial.
5. Verdict of the jury.
6. Motion to arrest judgment.
7. Order overruling motion.
8. Motion for a new trial.

9. Order overruling motion for a new trial.
10. Petition for writ of error.
11. Assignment of Errors.
12. Order allowing writ of error.
13. Writ of error.
14. Citation and proof of service.
15. Bond on writ of error.
16. Bill of exceptions.
17. Order approving bill of exceptions.
18. Order extending time for filing transcript of record.
19. Stipulation as to printing of record.
20. Precipe for transcript.

Joseph C. Breitenstein, G. J. Pilliod, Attorneys for Plaintiff in Error.

[fol. 39] NORTHERN DISTRICT OF OHIO, ss:

IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

I, B. C. Miller, Clerk of the District Court of the United States for said District, do hereby certify that the annexed and foregoing pages contain a full, true and complete copy of the final record, including the bill of exceptions in narrative form, petition for writ of error, assignment of errors and bond on writ of error, and all proceedings in said cause, in accordance with the præcipe for transcript filed by plaintiff in error, the originals of which are now in my custody as Clerk of said court.

There is also annexed to and transmitted with such transcript of record the writ of error and the citation issued and allowed in this case.

In testimony whereof, I have hereunto signed my name and affixed the seal of said court at Cleveland, in said District, this 23 day of February, A. D. 1924, and in the 148th year of the Independence of the United States of America.

B. C. Miller, Clerk, by M. E. Bauman, Deputy Clerk. (Seal of the District Court, Northern District of Ohio.)

Endorsed on cover: File No. 30,156. N. Ohio D. C. U. S. Term No. 303. Yee Hem, plaintiff in error, vs. The United States of America. Filed March 1, 1924. File No. 30,156.

FILED
MAR 16 1925
WM. R. STANSBURY
CLERK

No. 303

In the Supreme Court of the United States

YEE HIM,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

JOSEPH C. BRETTENSTEIN,
1163 Union Trust Building, Cleveland, O.,

GERARD J. PHILLON,
1136 Guardian Building, Cleveland, O.,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States

YEE HIM,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

JOSEPH C. BREITENSTEIN,
1163 Union Trust Building, Cleveland, O.,

GERARD J. PILLIOD,
1136 Guardian Building, Cleveland, O.,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States

YEE HIM,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the night of August 21st, 1923, at Cleveland, Ohio, the plaintiff in error, Yee Him, was arrested in a local lodging house. In his hand was an opium pipe, and on the bench beside him a package of cigarettes within which was concealed a quantity of opium prepared for smoking.

These facts are undisputable, and the evidence did not go beyond these facts. They constitute the entire case. No scintilla of evidence was introduced regarding the origin of the opium, its importation or manufacture. (Record, pages 10, 11 and 12.)

Plaintiff in error was indicted and convicted under the provisions of the acts *February 9, 1909, c. 100, Par. 2; January 17, 1914, c. 9; May 26, 1922, c. 202, Par. 4; Barnes Code Section 8375; Supplement 8374,* which provides as follows:

> "If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or de-

> rivative thereof, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of such opium, or preparation or derivative thereof after importation, knowing the same to have been imported, contrary to law, shall be fined. * * * Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such opium or preparation or derivative thereof, such evidence shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

The gist of the alleged offense was that he did feloniously conceal and facilitate the concealment after importation into the United States of smoking opium, then and there well knowing it to have been imported into the United States contrary to law.

The defendant, now plaintiff in error, did not testify, nor introduce any evidence.

SPECIFICATION OF ERRORS.

The issues relate first, to the sufficiency of the evidence to sustain a conviction, and second, to the constitutionality of that portion of the act which reads as follows:

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such opium or preparation or derivative thereof, such evidence shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

which was quoted verbatim by the Court to the jury in his charge. (Record, Page 13.) It is contended by plaintiff in error that he was thereby denied due process of law, as applied to criminal actions.

These issues were raised, first—by a motion to direct a verdict at the close of all the testimony. (Record, page 12.) Second—by certain exceptions to the Court's charge, which charge was as follows, (Record, Page 12):

"It is further provided by the Act, as amended, that after July 1st, 1913, all smoking opium, or opium prepared for smoking, found within the United States shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the accused to rebut such presumption; that is, where the evidence shows that there is smoking opium in the possession of the accused, at the place and time set forth in the indictment under which he stands charged for the violation of this Act, it will be presumed that such smoking opium was imported after the first day of April, 1909, and the burden of proof is upon the defendant, or the accused, to rebut that presumption. By rebutting the presumption, I mean simply negativing the presumption—introducing evidence which negatives the presumption that the smoking opium was introduced into the country in violation of this law —not by evidence beyond the existence of a reasonable doubt, but evidence which by the probabilities negatives that presumption.

"It is also further provided by the Act, as amended, that when one is upon trial for the violation of this section of this law which I have read to you, and the defendant is shown, by the evidence, to have had possession of such opium or preparation, or derivation thereof, that such possession by the defendant shall be deemed sufficient evidence to authorize the conviction of the accused, unless the defendant, or the accused, shall explain such possession of the smoking opium to the satisfaction of the jury; that is, it is incumbent upon the defendant, or the accused, where the evidence shows, beyond a reasonable doubt, that the smoking opium was in his possession at the time and place set forth in the

indictment, it is the duty of the defendant, or accused, to explain to the jury that he is rightfully in possession of the smoking opium—at least, explain it to the satisfaction of the jury and to the reasonable minds which under the law are to constitute the jury passing upon that question."

and, by certain requests addressed to the trial court with reference to his charge which appear, Record, Page 15, as follows:

"Mr. Pilliod: If the court please, I had submitted several suggested charges. Some of those have been already included in the Court's remarks. I think the Court has those. Might not this be included: The Court is respectfully requested to charge that crude opium may be lawfully and, subject to certain requirements of law and Government and departmental regulations, imported or brought into the United States, and could so lawfully be imported or brought into the United States at the time and prior to the time when this offense was alleged to have been committed.

The Court: Well, upon that, there is no evidence other than the evidence adduced on behalf of the Government.

Mr. Pilliod: Well, doesn't the law speak for itself?

The Court: If it has any application to the facts and the evidence, yes.

Mr. Pilliod: But isn't the jury entitled to know, in the absence of any specific proof that this particular narcotic had been smuggled unlawfully into the country, that it might be a part of the opium lawfully imported into the country and opium converted into smoking opium. That is a possibility which the jury has a right to consider.

The Court: What do you say, Mr. Day?

Mr. Day: I believe, your Honor, that has no application to this particular charge. The law specifically states that smoking opium found in the possession of a violator, of an alleged violator, is presumed to have been imported before February 9th, 1909 and does not go into the fact as to whether it is imported and converted.

The Court: I think I will stand on that. You may have the benefit of an exception to the Court's refusal to give that.

Mr. Pilliod: Note an exception. And I would suggest that the Court charge that smoking opium is manufactured from crude opium; that while smoking opium cannot, of course, be lawfully imported into the United States, that crude opium might be. It would make it more explicit. It is not lawfully possible to import any smoking opium into the United States. I think I am right about that.

The Court: Well, that would be true if there were some dispute on the question, but then I would feel that you would be entitled to the charge, but there isn't any controversy on the question and I am submitting the question upon which evidence has been introduced to the jury; that is, I am not in fact deciding that point, but requiring the Government to prove that. You may have an exception.

Mr. Pilliod: Now, your Honor, the defendant objects to the charge of the Court in which the Court said, in quoting the Act of February 9th, 1909, as amended, that whenever one is on trial for violation of sub-division C, the defendant is shown to have had or to have been in possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize a conviction, unless the defendant explains the possession to the satisfaction of the jury. We object, because such charge is a direction from the Court to the jury to find the defendant guilty, that it violates the defendant's rights as guaranteed under the fifth and seventh amend-

ments to the Constitution of the United States, in that it deprives him of his liberty without due process of law; and that the charge of the Court invades the province of the jury as sole judges of the evidence and of the weight of the evidence and credibility of the witnesses, and that the accused is in effect then obliged to testify against himself.

The Court: You may have those exceptions to the charge in that respect.

Have you anything further, Mr. Day?

Mr. Day: We have no requests.

Mr. Breitenstein: Your Honor, I also desire to suggest and except at this time to that particular portion of the charge where you said, in substance, in connection with that Act of February 9th, 1909, that where opium is found in the possession of the accused, that the burden of proof is upon the defendant. I except, because that also interferes with the defendant's right of due process of law and is in violation of his rights as guaranteed under the fifth, seventh and fourteenth amendments to the Constitution of the United States.

The Court: Well, you may have your exception.

Mr. Breitenstein: Please note an exception.

The Court: Now, members of the jury, you will have with you in your jury room such exhibits as have been marked for identification, offered and received in evidence, and as well a copy of this indictment against the accused. It is merely, however, for your information and not to be taken by you in any sense as evidence against the defendant, or as any presumption as to his guilt, but merely for your information as to what the charge of the Government is against this defendant.

Mr. Breitenstein: Your Honor, may I also except to that part of your charge wherein you refer to the particular section of the law relating to the

burden of proof and the sufficiency of the evidence, in that it calls the attention of the jury to the fact that the defendant did not take the witness stand in his own behalf, in violation of Article V, of the Constitution of the United States.

The Court: You may now retire".

Third: By motion to arrest judgment. It appears on page 4 of the Record as follows:

"The defendant was denied in the trial of this case due process of law and a trial by jury as provided and guaranteed by the 5th and 7th and 14th Amendments to the Constitution of the United States, for the reason that the Act aforesaid invaded the proper province of the jury and abridges and impairs the rightful function of the jury as the sole judges of the facts and the weight of the evidence and the credibility of the witnesses: And, because:

2nd. Paragraph "F" of Section 2 of the Statute under which the indictment in this case was brought and trial had, to-wit: an Act to amend the Act entitled 'An act to prohibit the importation of opium for other than medicinal purposes, approved February 9, 1909, as amended', is unconstitutional and void in this—that the defendant was denied in the trial of this case due process of law and a trial by jury as provided and guaranteed by the 5th and 7th Amendments to the Constitution of the United States, for the reason that the Act aforesaid invaded the proper province of the jury and abridges and impairs the rightful function of the jury as the sole judges of the facts and the weight of the evidence and the credibility of the witnesses, and because the said paragraph 'F' in effect obliged the defendant to testify against himself."

ARGUMENT.

Article V of the Constitution of the United States provides:

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

Defining the term "due process of law," it was said by the Supreme Court of the United States in a notable case—*John Den, ex dem., Murray vs. Hoboken Land & Improvement Company,* 18 Howard, 272, 276, 277, 15 L. Ed. 372-374:

> "The Constitution contains no description of those practices which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process due process of law by its mere will. To what principles are we then to resort to ascertain whether the process enacted by Congress is due process. To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the Common and Statute Law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political constitution by having been acted on by them after the settlement of this country."

Applying this broad principle as a test it becomes apparent that in the administration of the criminal law

any deprivation of any right of an accused person guaranteed to him by the Constitution of the United States, or by any act of Congress, or by the settled usages of the common law, is a denial of due process, and for this purpose the several provisions of the Constitution of the United States relating to personal liberty and security should be read together with the due process clause contained in the Fifth Amendment. *Callan vs. Wilson,* 127 U. S. 540, 32 L. Ed. 223, 8 S. C. 1301; *Boyd vs. The United States,* 116 U. S. 616, 29 L. Ed. 746, 6 S. C. 524.

In pursuance of these doctrines inherent in our jurisdiction, these fundamental principles are invoked.

I: The burden rests upon the prosecution to prove the guilt of the accused as to all the essential elements of the alleged crime, and the burden never shifts to the accused. *U. S. vs. Gooding,* 12 Wheat. 460; 6 L. Ed. 693; *Agnew vs. U. S.,* 165 U. S. 36; 41 L. Ed. 634.

II: The accused shall have the full benefit of the presumption of innocence and this attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. *Kirby vs. United States,* 174 U. S., 47 to 64, 43 L. Ed. 890; *Coffin vs. United States,* 156 U. S. 432, 39 L. Ed. 481-493.

III: The accused shall enjoy the right to be confronted with the witnesses against him. *Constitution of the United States, Art. VI. Kirby vs. United States, supra.*

IV: The jury are the sole judges of the weight and sufficiency of the evidence and credibility of witnesses.

V: The accused shall not be compelled to be a witness against himself. *Constitution of the United States,*

Article V; *Brown vs. Walker,* 161 U. S. 591, 40 L. Ed. 819; 16 S. C. 644.

The statute in question rests upon the authority of Congress to restrict imports, and the jurisdiction of the Court was derived accordingly. The statute denounces primarily the unlawful importation of opium and declares such importation after April, 1909 to be unlawful, except for certain purposes and under certain regulations. *Acts February 9, 1909, c. 100, Para. 1. January 17, 1914, c. 9. May 26, 1922. Barnes Code 8374, Supplement 8374.*

Up to this point the authority of Congress is unquestioned. But the legislators sought to go further. As in the Harrison Act they desired to reach the mere possession of smoking opium and fastened to such possession a penal responsibility to the Federal Government. To achieve this purpose it was necessary to infuse into "possession" a criminal element allying it with the original source of congressional authority and Federal jurisdiction, and *scienter* was therefore employed to give to the offense a Federal tinge.

"Knowing the same to have been imported contrary to law" constitutes a necessary ingredient of the offense, and the duty therefore rests upon the Government to prove, first—that the opium had been in fact imported contrary to law, second—that the accused had knowledge of that fact. Such facts would generally be difficult if not impossible of proof, and the statute therefore provides a special rule of evidence to meet the exigency, and effectually relieves the prosecution of the burden and places it upon the defendant. Now it is not contended that a rigid rule of evidence exists derived from the common law or the principles of the Constitution which pro-

hibits Congress from constituting certain facts presumptive or *prima facie* evidence of guilt, as, for instance, the possession of narcotics under the Harrison Act. This may well be a reasonable exercise of legislative power, but it is fraught with dangers and ought to be jealously confined. The question is whether Congress has exceeded proper limits in thus creating a special rule of evidence profoundly affecting the constitutional privileges of the accused. Now, to say that possession of narcotics "shall be presumptive evidence of a violation of this section," *Harrison Act, Section "A," Barnes Code Section 5459,* or that "the absence of appropriate tax paid stamps shall be *prima facie* evidence of a violation of this section and the possession of any original stamped packages containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section, shall be *prima facie* evidence of liability of pay such tax;" *Act December 17, 1914, as amended; Barnes Supplement, Section 5452,* may, as an illustration, conceivably be within the proper limits, but the provision in question goes far beyond these. Presumptive evidence and *prima facie* evidence may well be established, and the court may so instruct a jury, but a wide margin of doubt may yet be left between such evidence and certitude beyond a reasonable doubt, and the accused by no means finds himself in the predicament of an instruction authorizing a conviction.

If we could proceed from a fixed premise that crude opium or its derivative could under no circumstances be imported into the United States, the problem would be simple indeed, but crude opium may be lawfully imported, and having been lawfully imported, may be unlawfully converted into smoking opium, and so diverted.

Shall mere restriction be construed to charge the accused with *scienter* equally with absolute prohibition? If so, why were unlawful importation and guilty knowledge expressly made ingredients of the offense. Congress apparently comtemplated the possibility that opium might be possessed which had not in fact been unlawfully imported, or which the accused did not know had been so imported. The presumption of accused's innocence therefore related to the fact of unlawful importation and his guilty knowledge thereof and the burden of proof continued with the Government until adequate evidence relating to these elements had been introduced. But no evidence was introduced and none was necessary under this statutory special rule of evidence as applied to the case and addressed to the jury in the Court's charge. Possession needed to be proved, and possession only, and the presumption of innocence and its corollary responsibility, the burden of proof were peremptorily interrupted by force of the statute, and the accused charged with guilty knowledge of unlawful importation stood before the jury condemned by the law because of possession.

Justice would require, at least in its Anglo Saxon concept, that evidence be introduced on these subjects, and that the accused be confronted with witnesses. The benefit of salutary rules excluding inadmissible, incompetent and irrelevant testimony is denied him. The opportunity to expose falsehood and to discover malice, are forcibly withheld, for if unlawful importation and guilty knowledge be difficult or impossible of proof by the Government, they are equally or more so by the accused, for aside from the practical difficulties surrounding the proof of origin of such opium he is forced

to explain his possession to the satisfaction of the jury, which tends rather to expose him to condemnation of his personal vice, than to the consequences of a violation of a federal import law.

We cannot hold unlawful importation and *scienter* to be necessary deductions from possession of smoking opium. Properly, then, the weight of all the evidence relating to possession insofar as the facts and circumstances may indicate unlawful importation with attendant guilty knowledge, should be left to the jury, but the law invades this province of the jury established immemorially under the common law, and fixes to the evidence the required probative weight, and having relieved the Government of the duty of proof and the jury of the opportunity of consideration, it places upon the defendant the burden of guilt "unless the defendant shall explain the possession to the satisfaction of the jury".

Assuming that the ambiguous clause means that the defendant shall explain possession as being separate and free from unlawful importation and guilty knowledge, its practical effect is to compel him to be a witness against himself. Should he decline, the consequence is obvious, and this proposition cannot be evaded by the contention that the law contemplates explanatory evidence generally, aside from the testimony of the accused. The constitutional provision against self incrimination should receive a broad construction to secure immunity to the citizen from every kind of self accusation. *Wilson vs. United States,* 221 U. S. 361, 55 L. Ed. 771. *Brown vs. Walker,* 161 U. S. 591, 40 L. Ed. 819. To compel a defendant, directly or indirectly, to produce witnesses is to compel him to become a witness against himself.

A sacred duty rests upon the Court to shield a defendant from every attempted encroachment upon his constitutional right, whether direct or indirect, for the privileges and immunities granted in the Constitution are those which belong of right to the citizens of all free governments. *M. C. Knight vs. United States,* 115 Federal 962, C. C. A. 6 Cir. *Slaughter House cases,* 16 Wall. U. S. 36, 21 L. Ed. 394.

Counsel feel privileged to urge in this case the broad principle of state sovereignty and opposition to federal legislative and bureaucratic encroachments. They have an abiding faith in the federal union and in the application of those doctrines by which unity is preserved, but the statute now in question presents only too obviously another instance of hanging federal criminal jurisdiction upon a thread, and evading the clear intention of the framers of the Constitution and the plain import of that document by a resort to finely spun construction of law.

Counsel mean no disrespect to the national Congress; the motive to protect public morals and to enlist in the war against narcotics the resources of the United States is commendable, but the method pursued is not within the purview of our Constitution.

Respectfully submitted,

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